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SOUTHKEY CITY SDN BHD v. TRIBUNAL TUNTUTAN PEMBELI RUMAH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO: WA-25-71-03-2018]
B 24 JANUARY 2019

ADMINISTRATIVE LAW: *Judicial review – Application to quash award of Homebuyer Tribunal – Developer extended time for delivery of vacant possession to homebuyer – Tribunal allowed homebuyer's claim for liquidated and ascertained* C *damages – Tribunal rejected developer's application for legal representation – Whether Tribunal has discretion to allow legal representation before it – Developer notified homebuyer of application for extension of time but homebuyer did not take positive steps to protest – Whether homebuyer estopped from raising issue – Whether homebuyer ought to be given right to be heard before Minister made decision to* D *extend time – Whether Minister's decision to allow extension of time illegal, null and void – Whether Tribunal's decision perverse or irrational*

The applicant was the developer of a housing project ('project') and the home buyer was the purchaser of a unit of the project and was the claimant against the developer before the Tribunal Tuntutan Pembeli Rumah ('Tribunal'). E The homebuyer entered into a sale and purchase agreement ('SPA') with the developer to purchase a parcel ('parcel'). Under cl. 25(1) of the SPA, vacant possession of the parcel shall be delivered to the home buyer within 42 months from the date of the SPA, that was before 10 March 2017. However, by virtue of a letter, the developer informed the homebuyer that F the developer was seeking for an approval to extend the time for delivery of vacant possession from 42 months to 48 months. The Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan ('Ministry') allowed the appeal to extend the time for delivery of vacant possession for a period of six months, and therefore vacant possession of the parcel should G be delivered by 10 September 2017. On 4 September 2017, the developer delivered vacant possession to the homebuyer, and the homebuyer took possession of the same. The homebuyer then filed this claim for liquidated and ascertained damages ('LAD') before the Tribunal for a sum of RM35,287.90. The Tribunal allowed the homebuyer's application; hence this application to quash the decision of the Tribunal. The applicant raised H these two main issues (i) the developer had applied to be represented by a solicitor before the Tribunal but the Tribunal rejected the application; (ii) the developer had notified the homebuyer of their application for an extension of time to the Minister but the homebuyer did not take any positive step to protest against such application, thus the homebuyer was estopped from I raising the same; and (iii) that the decision of the Tribunal was irrational and perverse.

Held (dismissing application with costs):

(1) The Tribunal has the discretion whether to allow legal representation before it and in this case the Tribunal had rejected the developer's application. There was no legal basis to disturb this exercise of discretion, as the Tribunal found itself bound by the decision of the High Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan*. Therefore, there was no requirement of legal representation to argue on the legal issues. (para 17)

(2) The issue of *estoppel* did not arise here as there was no legal requirement for the homebuyer to raise an objection upon being notified of the developer's application to extend time. As far as the homebuyer is concerned, it was up to the Minister whether to allow the extension or not. But if the Minister is minded to allow the extension, then this would affect the homebuyer's right to LAD under the SPA. Therefore, the homebuyer must be given a right to be heard before the Minister makes such a decision, which would affect the homebuyer's legal rights. (para 22)

(3)(a) Since the homebuyer was not given a right to be heard before the Minister made the decision to extend the time for delivery of vacant possession from 42 months to 48 months, the Minister's decision was illegal, null and void. Therefore, there was no valid extension of time and the homebuyer was entitled to the LAD. Consequently, the decision of the Tribunal could not be said to be perverse or irrational. (para 23)

(4) In any event, any amendment to the SPA required the consent of both parties. Clause 8 of the SPA provides that 'time is of the essence in relation to all provisions of this agreement.' In view of this clause, and bearing in mind that the SPA was entered into by the homebuyer and the developer, the consent of both parties was required before any term of the SPA could be varied. As such, the extension of time was invalid, null and void as the homebuyer had not consented to it. Herein, the applicant/developer had failed to establish that the award was illegal and/or irrational. (paras 24-26)

Case(s) referred to:

ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors [2013] 8 CLJ 1020 HC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Ors [2017] 1 LNS 1260 HC ***(refd)***

GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors [2017] 1 LNS 193 HC ***(refd)***

Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Ang Ming Lee & Ors And Other Appeals [2018] 9 CLJ 640 CA ***(refd)***

Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor [2007] 1 CLJ 300 HC ***(refd)***

Legislation referred to:
Housing Development (Control and Licensing) Act 1966, s. 16U
Housing Development (Control and Licensing) Regulations 1989, reg. 11

For the applicant - Vanaja Nambiar; M/s Isharidah Ho Chong & Menon
For the 2nd respondent - Eric Soon & Shuhaidah Ahmad; M/s Soon Gan Dion & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi J:

Application

[1] This application is to quash the award dated 11 January 2018 of the first respondent, Tribunal Tuntutan Pembeli Rumah ("Tribunal") which has allowed the second respondent's ("homebuyer") claim of RM35,287.90 as liquidated and ascertained damages ("LAD").

[2] Having considered the application and the submission of the parties, this court has dismissed the application with costs.

The Salient Facts

[3] The applicant is the developer ("developer") of a housing project known as "Southkey Mosaic Serviced Apartment" ("project"). The homebuyer was the purchaser of a unit of the project and was the claimant against the developer before the Tribunal.

[4] The first respondent is the Tribunal for the Homebuyer Claims which is an agency of the Ministry of Urban Well-being, Housing and Local Government.

[5] On 11 September 2013, the homebuyer entered into a sale and purchase agreement ("SPA") with the developer to purchase a parcel described as parcel/provisional unit No. A-16-9, Storey No. 16, Building No Tower A with accessory parcel ("parcel") for a purchase price of RM603,000.

[6] Under cl. 25(1) of the SPA, vacant possession of the parcel shall be delivered to the homebuyer within 42 months from the date of the SPA, that is, before 10 March 2017.

[7] However, by virtue of a letter dated 11 September 2013, the developer informed the homebuyer that the developer was seeking for an approval from the Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan ("Ministry") to extend the time for delivery of vacant possession from 42 months to 48 months in respect of the SPA.

[8] On 1 December 2016, the Ministry allowed the appeal to extend the time for delivery of vacant possession for a period of six months, that is from 42 months to 48 months, and therefore vacant possession of the parcel should be delivered by 10 September 2017.

[9] At all relevant times, the homebuyer was informed on this application for an extension of time for delivery of vacant possession.

[10] On 4 September 2017, the developer has delivered vacant possession to the homebuyer, and the homebuyer took possession of the same.

[11] The homebuyer filed this claim for LAD before the Tribunal on 17 November 2017, for a sum of RM35,287.90.

[12] The Tribunal has allowed the homebuyer's application; hence this application is to quash the decision of the Tribunal.

The Findings Of The Court

[13] With regards to the substantive application, the governing principles on judicial review relating to statutory tribunals were held by the court in *Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor* [2007] 1 CLJ 300, where Low Hop Bing J (later JCA) held as follows:

> [12] At this juncture, it is appropriate for me to set out the principles governing the grounds for sustaining a substantive notice of motion to challenge a decision-making process by way of *certiorari*, as follows:
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> (1) It is neither an appeal nor a review of the decision itself, but a review of the decision-making process of the Tribunal to see if there are errors of law on the face of the record;
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> (2) It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed;
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> and an error may be disclosed if the decision-maker eg:
>
> (a) asks himself the wrong question;
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> (b) takes into account irrelevant considerations;
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> (c) omits to take into account certain relevant considerations (an Anisminic error);
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> (d) misconstrues the terms of the relevant statute; or
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> (e) misapplies or misstates a principle of general law.
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> (per Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union* [1995] 2 CLJ at p. 765 f-g CA);
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> (3) In process or substance, an impugned decision is flawed on ground of:

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(a) illegality, meaning that the decision must be based on law and the decision-maker must understand directly the law that regulates his decision-making power and must give effect to it, and whether he has or not is par excellence a justiciable question;

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(b) irrationality meaning "*Wednesbury* unreasonableness", so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it, as enunciated in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223;

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(c) procedural impropriety covering failure:

(i) to observe basic rules of natural justice;

(ii) to act with procedural fairness;

(iii) to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice; and

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(4) possibly, proportionality.

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(per Edgar Joseph Jr FCJ in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 at pp. 172b-173b; referring to the judgment of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374.)

[14] With regards to the Housing Tribunal, in *ABT Construction Sdn Bhd & Anor v. Tribunal Tuntutan Pembeli Rumah & Ors* [2013] 8 CLJ 1020, Justice Varghese George (later JCA) held as follows:

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[37] The court in dealing with a judicial review application was not sitting in appeal against the impugned decision or award but only exercising the court's supervisory powers over subordinate Tribunals. To merit curial intervention, the applicant concerned had to establish that 'errors' in the nature of 'illegality', 'irrationality' or 'procedural impropriety' (and maybe 'proportionality') had been committed during the decision making process ....

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[38] The judicial review court's intervention on the grounds of 'illegality' would be available if it was shown that the decision maker had misconstrued any provision of a statute or misapplied a principle of general law. A decision could be quashed on the basis of 'irrationality' if it was shown that there was no basis to support the finding of fact, or the conclusion reached was diametrically contrary to evidence on record or where the decision maker had asked the wrong questions or taken into consideration irrelevant matters and omitted relevant matters.

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[15] The developer has raised two main issues:

(i) Legal representation before the Tribunal; and

(ii) The Tribunal finding is irrational and perverse.

[16] With regards to the issue of representation, the same is provided under s. 16U of the Housing Development (Control and Licensing) Act 1966 ("Act 118"):

> 16U. Right to appear at hearings.
>
> (1) At the hearing of a claim every party shall be entitled to attend and be heard.
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> (2) No party shall be represented by an advocate and solicitor at a hearing unless in the opinion of the Tribunal the matter in question involves complex issues of law and one party will suffer severe financial hardship if he is not represented by an advocate and solicitor; but if a party is subsequently allowed to be represented by an advocate and solicitor then the other party shall also be entitled ...

[17] The developer has applied to be represented by a solicitor before the Tribunal to argue on legal issues. The Tribunal has the discretion whether to allow legal representation before it, and in this case the Tribunal has rejected the developer's application. I find no legal basis to disturb this exercise of discretion, as the Tribunal finds itself bound by the decision of the High Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Ors* [2017] 1 LNS 1260; [2017] MLJU 1366. Therefore, there is no requirement of legal representation to argue on the legal issues.

[18] In *GJH Avenue Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan* [2017] 1 LNS 193, on the issue of binding precedent, the High Court held as follows:

> [14] So the law is well settled by high authority that for the purposes of determining the date of delivery of vacant possession in an agreement such as the SPA, for reasons well explained in the above cases, the date of agreement is the date when the deposit or booking fee is paid and not the date that appears on the SPA. **And by the doctrine of** stare decisis**, these decisions of the superior courts are binding on the 1st Respondent as a lesser Tribunal, as well as this court**. This doctrine was reiterated by the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577; [2012] MLJU 60 where the court held:
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> > The doctrine of precedent, a fundamental principle of English Law, is a form of reasoning and decision-making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle

announced by a higher court must be followed in later cases. In short the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedents established by prior decisions. This legal principle is called stare decisis. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of stare decisis, i.e., to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law. (emphasis added)

[19] The next issue is whether the decision of the Tribunal is irrational and perverse. The parties have submitted on the issue of the right to be heard before the decision to extend time was made by the Minister, extending the time to deliver vacant possession from 42 months to 48 months.

[20] This issue has been decided by the Court of Appeal in *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor v. Ang Ming Lee & Ors And Other Appeals* [2018] 9 CLJ 640; [2018] MLJU 638, where the court held as follows:

[24] The final issue raised before us was whether the purchasers ought to have been given a right of hearing prior to the decision made by the Controller and/or Minister. In this respect, we note that the purpose of the Act was to protect the interest of the purchasers. *As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even distinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made.*

[25] As the purchasers comprise a group which can be easily ascertained, *they should at least be notified of the developer's application for any extension of time to complete the project and be given a reasonable period of time to state their views before such decision is taken. As no such right to be heard was afforded to the purchasers, it is our judgment that the decision made in this case, whether by the Controller or the Minister, was null and void and of no effect and should accordingly be set aside*. (emphasis added)

[21] In the present application, the developer submits that since they have notified the homebuyer of their application for an extension of time to the Minister *vide* a letter dated 11 September 2013, and that the homebuyer did not take any positive step to protest against such application for extension of time, then the homebuyer is estopped from raising the same before this court.

[22] The issue of estoppel does not arise here as there is no legal requirement for the homebuyer to raise an objection upon being notified of the developer's application to extend time. As far as homebuyer is concerned, it is up to the Minister whether to allow the extension or not. But if the Minister is minded to allow the extension, then this will affect the

homebuyer's right to LAD under the SPA. Therefore, in such circumstances, the Homebuyer must be given a right to be heard before the Minister makes such a decision, which will affect the homebuyer's legal rights. This is supported by the decision of the Court of Appeal in *Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan v. Ang Ming Lee & Ors And Another Appeal*, where the court held as follows:

> [31] ... *As the rights of the purchasers to claim damages on the event of delay would be adversely affected or even extinguished by the exercise of such discretionary power, it is our judgment that the purchasers must be given an opportunity to be heard prior to any decision made.* Since no such right was afforded, the decision of the Minister cannot stand and must be set aside. (emphasis added)

[23] In the present case, since the homebuyer was not given a right to be heard before the Minister made the decision to extend the time for delivery of vacant possession from 42 months to 48 months, then the Minister's decision is illegal, null and void. Therefore, there is no valid extension of time and the homebuyer is entitled to the LAD. Consequently, the decision of the Tribunal cannot be said to be perverse or irrational.

[24] In any event, parties have also submitted that any amendment to the SPA requires the consent of both parties. There is no specific provision on this in the SPA, but cl. 8 of the SPA provides that 'Time is of essence in relation to all provisions of this agreement.' In view of this clause, and bearing in mind that the SPA was entered into by the homebuyer and the developer, the consent of both parties is required before any term of the SPA can be varied.

[25] No doubt that the SPA is in the prescribed form pursuant to reg. 11 of the Housing Development (Control and Licensing) Regulations 1989, but this is only with regards to the format of the contract which the parties have to comply with. On the interpretation of the term of the SPA, and with specific reference to cl. 8, I am of the considered opinion that the consent of both parties is required before any provision of the SPA can be varied. This is in line with the requirement of a right to be heard before the Minister can make a decision to extend the time to deliver vacant possession. As such, I am also of the considered opinion that the extension of time is invalid, null and void as the homebuyer has not consented to it.

Conclusion

[26] Premised on the reasons enumerated above, I am of the considered opinion that the applicant/developer has failed to establish that the award is illegal and/or irrational. The application is hereby dismissed with costs.